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No. 86-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

HOSPITAL CORPORATION OF AMERICA,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether the Court of Appeals erroneously concluded that the decision of the Federal Trade Commission under review was based upon substantial evidence, in primary part because of an erroneously narrow interpretation—directly contrary to the interpretations of other courts of appeal—of this Court's decision in *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974), which led the court below to conclude that the FTC was entitled to place primary reliance upon naked market share and concentration statistics in determining the legality under the antitrust laws of the horizontal acquisitions at issue.

(2) Whether the initiation of a law enforcement proceeding by the Commissioners of the Federal Trade Commission, who are beyond the control and supervision of the President, represents an unconstitutional exercise of the executive Power in violation of Article II of the Constitution.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Hospital Corporation of America ("HCA") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit affirming the decision of the Federal Trade Commission is reported at 807 F.2d 1381 and appears as Appendix A, pp. 1a-23a. The order of the Court of Appeals for the Seventh Circuit appears as Appendix B, pp. 24a-25a. The opinions of the Federal Trade Commission and the administrative law judge are reported at 106 F.T.C. 361 and appear as Appendices C, pp. 26a-138a, and D, pp. 139a-276a, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on December 18, 1986. App. B, p. 24a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article II, Sections 1, Clause 1, and 3 of the Constitution of the United States provide in relevant part:

> "The executive Power shall be vested in a President . . . . [who] shall take Care that the Laws be faithfully executed . . . ."

2. Section 7 of the Clayton Act, ch. 323, 38 Stat. 731, 15 U.S.C. § 18, as amended, provides in relevant part:

> "No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly."

3. Section 5 of the Federal Trade Commission Act, ch. 311, 38 Stat. 719, 15 U.S.C. § 45, as amended, provides in relevant part:

> "(a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
>
> (2) The Commission is empowered and directed to prevent persons, partnerships, or corporations, . . .

> from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.
>
> * * * *
>
> (b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect . . . ."

4. Section 1 of the Federal Trade Commission Act, ch. 311, 38 Stat. 718, 15 U.S.C. § 41, as amended, provides in relevant part:

> "Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."

STATEMENT

This case presents two important and recurring questions of law. The first is whether the legality of horizontal acquisitions under the antitrust laws should be determined primarily upon the basis of market share and concentration statistics, without a thorough exploration of all relevant evidence bearing upon the actual likelihood of a substantial lessening of competition. In so concluding, the Court of Appeals adopted a restrictive and narrow interpretation of this Court's decision in *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974), and subsequent cases that conflicts with the interpretations of other lower courts.

The second issue is whether the discretionary decision of the Commissioners of the FTC to initiate an enforcement proceeding challenging the two acquisitions at issue, one of which the Department of Justice had previously

reviewed and decided not to challenge, represents an unconstitutional exercise of the executive power by individuals who are not subject to the control and supervision of the President. The resolution of this issue is obviously important to the functioning of the federal government. But an affirmative answer would *not* mean that the Federal Trade Commission and other similarly constituted agencies are unconstitutional. It would mean that discretionary determinations to initiate enforcement proceedings before these agencies would have to be made by individuals subject to the control and supervision of the President, rather than by members of an independent fourth branch of Government.

This case arises out of two separate 1981 acquisitions by HCA, a hospital management company, of two other hospital management companies, Hospital Affiliates International, Inc. ("HAI") and Health Care Corporation ("HCC"). HAI owned a number of hospitals including one in Chattanooga, Tennessee, and provided management services to other hospitals, including two in Chattanooga. The proposed HAI acquisition was thoroughly reviewed by the Department of Justice pursuant to the Hart-Scott-Rodino Act. Following its examination of the voluminous documents produced by both HCA and HAI, the Department informed HCA that it would not seek to enjoin the acquisition, which was consummated in October 1981.

HCC, which HCA acquired later in 1981, was primarily a psychiatric hospital management company, but also owned a single acute-care hospital in Chattanooga, Tennessee. The Federal Trade Commission assumed jurisdiction over that proposed acquisition. In doing so the FTC also undertook to reactivate an investigation of the HAI acquisition with respect to acute-care hospitals in Southeast Tennessee. In December 1981 HCA was informed that the Commission was continuing its investigation but would not seek to enjoin the acquisition of HCC, which was then promptly consummated.

On July 30, 1982, the complaint initiating these proceedings was issued alleging that HCA's acquisitions of both HCC's hospital and HAI's owned and managed hospitals in Southeast Tennessee violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. In October 1984, an administrative law judge concluded after extensive hearings that HCA's acquisition of HCC and HAI's owned hospitals might substantially lessen competition in the Chattanooga area in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. In October 1985 the Commission largely affirmed the administrative law judge's initial decision by giving primary weight to market share statistics, while modifying it in certain respects, principally by rejecting the law judge's findings that HCA should not be treated as the owner of hospitals it managed under short-term contracts as the successor in interest to HAI. HCA was ordered to divest the two hospitals acquired from HAI and HCC, to terminate its remaining management contract with a hospital formerly managed by HAI, and to provide prior notification to the Commission of certain future hospital acquisitions.

HCA appealed the Commission's decision to the Court of Appeals for the Seventh Circuit which affirmed the Commission's decision on December 18, 1986, by holding that the Commission was entitled to give primary weight to market share and concentration statistics, and narrowly interpreting contrary decisions by this Court.

REASONS FOR GRANTING THE WRIT

The petition for a writ of certiorari should be granted for two independent reasons. First, the question of the weight to be given to market share statistics has been the subject of conflicting decisions in the federal courts. Second, the question whether the Commissioners of the Federal Trade Commission can constitutionally initiate an enforcement proceeding is a fundamental question of clear importance.

The questions raised by this case are also important because of the dramatic implications of the decision below for the structure of the health care industry in the United States. Persistent overcapacity in hospitals across the country has led to universal calls for the consolidation of hospitals in local markets. Nevertheless, the deference paid by the court below to the modest market share statistics in this case—without which the Commission's decision could not plausibly be considered supported by "substantial evidence"—means that virtually no horizontal consolidation of hospitals is possible in most local hospital markets. *See, e.g.*, Schramm & Renn, *Hospital Mergers, Market Concentration and the Herfindahl-Hirschman Index*, 33 Emory L.J. 869 (1984).

A. Federal Courts Have Reached Conflicting Interpretations Concerning The Role Of Market Share Statistics Following *General Dynamics*.

During the 1960's, the decisions of this Court applying Section 7 of the Clayton Act, 15 U.S.C. § 18, to horizontal mergers assigned great weight, in practical effect seemingly dispositive weight, to market shares. *See, e.g.*, *United States v. Philadelphia National Bank*, 374 U.S. 321, 363 (1963) (focus on whether merger "produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market"); *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 278-81 (1964); *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 275-78 (1966); *United States v. Pabst Brewing Co.*, 384 U.S. 546, 551-53 (1966). The upshot of the preeminence given to market share statistics in antitrust analysis was that, in Justice Stewart's words, "the Government always wins." *United States* v. *Von's Grocery Co., supra*, 384 U.S. at 301 (Stewart, J., dissenting).[1]

[1] Justice Stewart's statement was true. When *Von's Grocery* was decided, the government had won every merger case previously decided by the Warren Court.

But in *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974), this Court made clear that market share statistics were not alone dispositive in analyzing the legality of a merger under the antitrust laws. The Court held that a horizontal merger did not violate the antitrust laws even though the market shares of the merging parties alleged by the government were 12.9 percent and 8.4 percent and the four-firm concentration ratio was 75.2 percent. While recognizing that market shares are an important economic fact, the Court emphasized that market shares are not "conclusive indicators of anticompetitive effects." *Id.* at 498. The Court went on to require a review of other market characteristics and stated that " 'only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable and competitive effect of the merger.' " *Id.*, *citing Brown Shoe Co.* v. *United States*, 370 U.S. 294, 322 n.38 (1962).

Following *General Dynamics*, the Court reiterated the need to consider market characteristics other than market share statistics when analyzing a merger. In *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 631 (1974), the Court stated that market shares "can be unreliable indicators of actual market behavior," and may "not accurately depict the economic characteristics of the . . . market." The following year in *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86, 120 (1975), the Court again expressed its view that market share statistics may give "an inaccurate account of the acquisitions' probable effects on competition."

After this Court's decision in *General Dynamics*, many lower courts properly considered factors other than mere market shares when assessing the legality of horizontal mergers. The Court of Appeals for the Eighth Circuit in *FTC* v. *National Tea Co.*, 603 F.2d 694 (1979), held that a horizontal merger between grocery chains did

not violate the antitrust laws because the acquirer was about to depart from the relevant markets, so that a simple combination of the two firms' market shares did not accurately reflect the future competitive strength of the new firm. *Id.* at 700. Citing *General Dynamics*, the court held that "while market share is an important indicator of a firm's future competitive strength, other factors may discount its significance." *Id.* The court found that taking account of such factors as the imminent departure of one party from the relevant market was appropriate as part of the scrutinization of the "probable future" of the market. *Id.*

The Court of Appeals for the Second Circuit in *United States* v. *Waste Management, Inc.*, 743 F.2d 976, 982-984 (1984), also followed *General Dynamics* in rejecting a Department of Justice challenge to an acquisition that resulted in a combined market share of 48.8 percent. Citing *General Dynamics*, the court held that "a substantial existing market share is insufficient to void a merger where that share is misleading as to actual future competitive effect. . . . In the present case, a market definition artificially restricted to existing firms competing at one moment may yield market share statistics that are not an accurate proxy for market power when substantial potential competition able to respond quickly to price increases exists." *Id.* at 982.

Other circuit courts of appeals have also followed this Court's decision in *General Dynamics* and refused to give conclusive weight to market share statistics, while examining other market characteristics. *See, e.g., FTC* v. *Warner Communications, Inc.*, 742 F.2d 1156, 1163 n.1 (9th Cir. 1984) ("We recognize that statistics concerning market share and concentration are not conclusive indicators of anticompetitive effects"); *FTC* v. *PPG Industries, Inc.*, 798 F.2d 1500, 1504 (D.C. Cir. 1986) (because it is "often true" that "statistics reflecting past market shares do not accurately indicate future market

shares," a court "must, of necessity, attempt to predict the future market and the merging firm's share of that market"); *Dome Stadium Hotel, Inc.* v. *Holiday Inns, Inc.*, 732 F.2d 480, 493 (5th Cir. 1984) (*General Dynamics* "underscores the importance in section seven cases of evidence of market conditions").

The Court of Appeals in this case affirmed the Commission's decision that HCA's acquisition in Chattanooga violated the antitrust laws by holding that the Commission was entitled to give primary weight to market share and concentration statistics, while dismissing this Court's decisions in *General Dynamics* and *Citizens & Southern National Bank* on the ground that "these cases involved highly unusual facts, having no counterpart in this case, that required discounting large market shares." App. A, p. 6a.[2] The court indeed suggested that the Commission need have "gone no further" than finding that the acquisitions resulted in a significant increase in market shares and market concentration, citing *United States* v. *Philadelphia National Bank, supra*, 374 U.S. at 362-63. *Id.*

Certain other lower courts have, like the Court of Appeals in this case, read *General Dynamics* and other recent decisions of this Court as representing no more than narrow, fact-bound exceptions to a still extant general principle that market shares should effectively be given dispositive weight. *See, e.g., Monfort of Colorado,*

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[2] The FTC had found that the two separate acquisitions if viewed together raised HCA's market share in the Chattanooga area from 14 percent to 26 percent, and that the four largest firms together had a 91 percent market share. Although HCA contends that these market share statistics are too high, because the FTC's conclusions regarding market share calculations were wholly unsupported by the record, the court below refused to consider HCA's arguments because, in its view, the difference between the FTC's market share figures and those submitted by HCA (and adopted as correct by the administrative law judge) was "too slight to make a legal difference." App. A, p. 3a.

Inc. v. *Cargill, Inc.*, 761 F.2d 570, 580 (10th Cir. 1985), *revd. on other grounds*, 107 S.Ct. 484 (1986) (market factors argued by defendant do not resemble factors such as long term contracts found relevant in *General Dynamics*, therefore analysis properly limited to "market share statistics plus limited information on industry structure, history and probable future"); *Liggett & Myers, Inc.* v. *FTC*, 567 F.2d 1273, 1275 (4th Cir. 1977) (in upholding FTC finding that merger violated antitrust laws, court focused exclusively on market share statistics, citing this Court's cases from the 1960's and stating that in *General Dynamics* the "adequacy of this measurement of proof was repeated").

The Court of Appeals did note that the Federal Trade Commission, in its decision holding that the HCA acquisitions violated the antitrust laws, gave some consideration to factors other than mere market shares and concentration. App. A, p. 11a. The court below found that "all these considerations, taken together [that is, market share and concentration statistics, and the other factors discussed] supported—we do not say they compelled—the Commission's conclusion that the challenged acquisitions are likely to foster collusive practices . . . in the Chattanooga hospital markets." App. A, p. 14a.

But the opinion of the Court of Appeals, with its drumbeat repetition and emphasis of market share and concentration statistics, provides no basis to conclude that it would have reached the same conclusion had it not interpreted *General Dynamics* and subsequent cases as consistent with near dispositive reliance on such market share and concentration statistics.

In short, the question posed by this petition is whether the legality of horizontal acquisitions under the antitrust laws should be judged by an even-handed weighing of all relevant evidence, as this Court mandated in *General Dynamics*, or whether lower courts and administrative agencies should assign near dispositive weight to

mere statistics, with only a perfunctory nod toward evidence concerning the actual competitive dynamics of the market. This question is of central and recurring importance to the administration of the antitrust laws.

The question is of particular importance to the future of the health care industry in America. Since there are only a limited number of hospitals in all but the largest cities, local hospital markets are characteristically highly concentrated by conventional standards, indeed more concentrated than the Chattanooga market involved in this proceeding. *See* App. C, p. 111a. If the decision in this case is correct, no significant horizontal consolidation will be lawful under the antitrust laws. *See* Schramm & Renn, *Hospital Mergers, Market Concentration and the Herfindahl-Hirschman Index*, 33 Emory L.J. 869 (1984). The conclusion should not lightly be embraced in view of the reality that virtually all health care authorities agree that hospital consolidations are desirable to promote efficiency in delivering hospital services and thereby to control spiralling costs. *See, e.g.*, H.R. Rep. No. 218, 98th Cong., 1st Sess. 3 (1983); S. Rep. No. 1285, 93d Cong., 2d Sess. 39 (1974).

B. The Unconstitutional Exercise Of The Executive Power To Initiate Enforcement Proceedings By The Independent Commissioners Of The Federal Trade Commission Raises An Important Constitutional Issue.

The second question presented is whether the initiation of enforcement proceedings by the Commissioners of the FTC, who are not subject to removal by the President except for cause, is contrary to the principle of separation of powers embodied in the Constitution. Decisions of this Court strongly support the argument that the Constitution prohibits any exercise by the Commissioners of the quintessentially executive power of enforcing the law. The Court should grant review to resolve this important constitutional question.

As this Court has recently observed, "[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." *INS* v. *Chadha*, 462 U.S. 919, 951 (1983). *See also Bowsher* v. *Synar*, 106 S.Ct. 3181, 3186 (1986). Within this scheme, "[t]he Framers provided a vigorous legislative branch and a separate and wholly independent executive branch, with each branch responsible ultimately to the people." *Id.* Moreover, "[a]lthough not 'hermetically' sealed from one another, . . . the powers delegated to the three Branches are functionally identifiable." *INS* v. *Chadha*, *supra*, 462 U.S. at 951, quoting from *Buckley* v. *Valeo*, 424 U.S. 1, 121 (1976).

The power to initiate and prosecute a civil or criminal case against a private person must be regarded as a basic element of the executive power that the Constitution entrusts to the President. This conclusion is compelled by the plain language of the Constitution, which provides that "[t]he executive Power shall be vested in a President," who "shall take Care that the Laws be faithfully executed . . . ." U.S. Const. Art. II, §§ 1, 3. Enforcing the law is unquestionably part of the President's responsibility to see that the laws are "faithfully executed."

This Court's decisions confirm that the decision whether to initiate a law enforcement proceeding is squarely within the executive power. For example, in *United States* v. *Nixon*, 418 U.S. 683, 693 (1974), the Court noted that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." Moreover, the Executive's exclusive constitutional authority over law enforcement applies to civil as well as criminal laws. This was made clear in *Buckley* v. *Valeo*, *supra*, where the Court held that, because members of the Federal Election Commission had been appointed

by congressional officers and not by the President in accordance with the Appointments Clause, they could perform only those duties that Congress could carry out by itself, "or in an area sufficiently removed from the administration and enforcement of the public law . . . ." 424 U.S. at 139. In reaching this result, the Court stated:

> "The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. *A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'* "

Id. at 138 (emphasis added).

By the same token, the Court has viewed the power "to initiate administrative proceedings against an individual or corporation" as analogous to "the prosecutor's decision to initiate or move forward with a criminal prosecution," and therefore similarly solely within the executive power. *Butz* v. *Economou*, 438 U.S. 478, 515 (1978). *See also Harlow* v. *Fitzgerald*, 457 U.S. 800, 811 n.16 (1982). In short, when government officials initiate administrative proceedings or initiate civil or criminal actions against private persons, they are exercising an "executive power" within the meaning of the Constitution.

Under the separation-of-powers doctrine, Congress may not exercise the executive power itself, nor may it assign such powers to a person subject to the direction and control of Congress. *Bowsher* v. *Synar*, *supra*. Nor may Congress commit the exercise of executive power to a fourth branch of government whose officials are not accountable to the President. Because the members of the Federal Trade Commission may be removed by the President only for cause, 15 U.S.C. § 41, they may not,

consistent with the Constitution, exercise the purely executive power of initiating and prosecuting administrative proceedings.

Contrary to the Court of Appeals' characterization, petitioner's constitutional argument does *not* challenge the institutional existence of the FTC, or that of similarly-constituted federal agencies. Thus, petitioner has never contended "that the FTC is unconstitutional," or that the adoption of petitioner's argument "would make every independent federal administrative agency unconstitutional." App. A, p. 20a. Instead, the constitutional issue presented is simply whether all law enforcement proceedings brought on behalf of the federal government must be initiated and prosecuted by an official who is constitutionally authorized to exercise the executive power —*i.e.*, one who is subject to the control of the President.

In the Court of Appeals, the Commission's response to petitioner's constitutional challenge rested exclusively on *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935).[3] But this issue was not decided in *Humphrey's*

[3] Although the court below expressly acknowledged the importance of the constitutional question, it refused to decide the question because it was of the opinion that petitioner's briefs did not devote sufficient space to the question. App. A, pp. 20a-22a. Notwithstanding the court's refusal to address this purely legal issue, it was properly raised below and, given its importance, it should be resolved by this Court. *See, e.g., Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 743 n.23 (1982). The court of appeals complained that HCA's briefs did not devote a large number of pages to the constitutional question. HCA's briefs, however, cited all of the key authorities and presented all the elements of the argument needed to support its contentions. If the court below believed that it needed additional briefing on the issue, it could have requested petitioner to submit a supplemental brief, as petitioner explicitly had offered to do. Pet. C.A. Br. 77 n.61. In this connection, we note that the Solicitor General's brief on the merits before this Court in *Humphrey's Executor* devoted seven pages to the constitutional question raised in that case. The court of appeals also complained that petitioner did not address

Executor. That case held that Congress could limit the President's authority to remove a member of the Commission who "occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President." *Id.* at 628. In doing so, however, the Court focused specifically only upon the responsibility of the Commission, upon the direction of the President, to investigate and report alleged antitrust violations, which it found to be an exercise of "quasi-legislative or quasi-judicial powers." *Id.* at 628 & n.*. No focused argument was presented to the Court concerning the Commission's power to initiate and prosecute violations of the antitrust laws. *See id.* at 612-18; Brief for United States at 20-27.

Humphrey's Executor thus did not address the constitutional issue presented by this petition, but even more fundamentally, this Court's more recent decisions, discussed above, show that the premises underlying *Humphrey's Executor* are unsound. Indeed, in his brief in *Bowsher* v. *Synar*, the Solicitor General observed that "developments since *Humphrey's Executor* . . . appear to have cast a shadow upon those premises." No. 85-1377, Brief for the United States, at 46 n.32.[4]

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the issues of "standing" and "ripeness," reasoning that petitioner had made "no effort to show that the President *wants* to remove any member of the FTC who voted for the complaint in this case, or that the complaint would not have been issued if the President had plenary removal power . . . ." App. A, pp. 20a-21a (emphasis in original). The court's concern is not well taken. Petitioner had no occasion to address these issues, since they were not raised by the Commission in defending against the constitutional challenge. In any event, as this Court concluded in *Bowsher* v. *Synar*, *supra*, 106 S.Ct. at 3191, "[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." Thus, it is not necessary for the President to attempt to remove the FTC commissioners without cause in order for the constitutional issue to be ripe.

[4] The Solicitor General elaborated on this point as follows:

"For example, the Court explained in *Chadha* that the fact that Executive Branch officers perform what might be character-

This case squarely presents the Court with an opportunity to reexamine the questionable premises underlying *Humphrey's Executor*.[5] Indeed, the dangers of reposing law enforcement powers in a "headless fourth branch" of government[6] are graphically shown by this case. As previously noted, the Department of Justice reviewed petitioner's acquisition of HAI and determined not to initiate a proceeding under the antitrust laws to challenge that acquisition. Several months later, the FTC ignored this discretionary determination by executive officials directly accountable to the President, and initiated this enforcement action challenging petitioner's acquisition of HAI under the antitrust laws.

The Court of Appeals recognized that the constitutional question presented here is of far-reaching importance. App. A, p. 20a. If petitioner's argument is accepted, the exercise of the executive power to initiate

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ized as 'quasi-legislative' or 'quasi-judicial' functions does not mean that they are exercising something other than executive power within the meaning of Article II. 462 U.S. at 953 n.16. This Court also affirmed the decision in *Consumers Union* v. *FTC*, 691 F.2d 575 (D.C. Cir. 1982) (en banc), *aff'd*, 463 U.S. 1216 (1983), which invalidated a legislative veto provision applicable to the FTC, thereby establishing that at least for that aspect of the doctrine of separation of powers, the FTC is not to be distinguished from other agencies in the Executive Branch. . . .

[A]gencies such as the FTC often perform functions that are indistinguishable from the enforcement of the law undertaken by executive departments."

[5] We note that the Ninth Circuit recently relied on *Humphrey's Executor* in upholding the constitutionality of the FTC Act's enforcement provisions. *FTC* v. *American National Cellular, Inc.*, No. 86-5760 (9th Cir. Feb. 25, 1987). In reaching that result, however, the court misread *Humphrey's Executor* and misapplied *Bowsher* v. *Synar*. *Id.*, slip op. at 5-6 (Tank, J., concurring). Nor is that result supported by any of this Court's decisions cited in the concurring opinion. *See id.* at 6-7.

[6] L. Jaffe, *Judicial Control of Administrative Action* 22 (1965).

law enforcement proceedings by "federal agencies whose members the President selects but cannot remove (before their terms expire) without cause" should be considered unconstitutional. *Id.* Thus, the question clearly merits review by this Court.

CONCLUSION

For the reasons stated, the writ of certiorari should be issued.

Respectfully submitted,

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